(5)

No. 03-637

Supreme Court, U.S.
FILED
DEC 31 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE AMELIA VENTURE PROPERTIES, LLC, J. DENBIGH ASSOCIATES, INC., SMITH FARM ENTERPRISES, LLC, AND SOUTHERN PINES ASSOCIATES, L.C. IN SUPPORT OF PETITIONERS

Hunter W. Sims, Jr.
Counsel of Record
KAUFMAN & CANOLES, PC
150 West Main Street, 21st Floor
Norfolk, Virginia 23510
(757) 624-3000

Counsel for Amici Curiae

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

AMICUS CURIAE BRIEF FOR A WRIT OF CERTIORARI IN SUPPORT OF PETITIONERS 1

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE EPA'S ASSERTION OF JURISDICTION OVER ISOLATED WETLANDS VIOLATES THE CLEAN WATER ACT AND SUPREME COURT PRECEDENT 5

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL 6

III. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE BEWILDERING ARRAY OF GOVERNING CLEAN WATER ACT LAW AND REGULATIONS 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases:

National Mining Ass'n v.
United States Army Corps of Engineers,
145 F.3d 1399 (D.C. Cir. 1998) 1

In re: Needham,
No. 02-30217, 2003 U.S. App. LEXIS 25318
(5th Cir. Dec. 16, 2003) 6, 7

Rice v. Harken Exploration Co.,
250 F.3d 264 (5th Cir. 2001) 6

Solid Waste Agency of Northern Cook County v.
U.S. Army Corps of Engineers,
531 U.S. 159 (2001) 5, 6, 7

Treacy v. Newdunn Associates, LLP,
344 F.3d 407 (4th Cir. 2003) 5

United States v. Deaton,
332 F.3d 698 (4th Cir. 2003) 5, 6

United States v. Riverside Bayview Homes,
474 U.S. 121 (1985) 5

Statutes:

33 U.S.C. § 1362(14) 9

33 U.S.C. § 1362(7) 9

33 U.S.C. § 1362(12) 9

Regulations:

33 C.F.R. § 328.3(a)(5) 9

33 C.F.R. § 328.3(a)(7) 9

33 C.F.R. § 328.4 10

33 C.F.R. § 329.11 10

AMICUS CURIAE BRIEF FOR A WRIT OF CERTIORARI IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amelia Venture Properties, LLC, J. Denbigh Associates, Inc., Smith Farm Enterprises, LLC, and Southern Pines Associates, L.C. respectfully file this brief as amici curiae in support of Petitioners' Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. Both parties have consented to the filing of this Brief.[1]

Each of the amici curiae are landowners in the Tidewater region of Virginia. Each own an undeveloped tract of land containing wetlands. None of the properties is adjacent to or contiguous to navigable or open water.

Each of the landowners was interested in improving the drainage at their property. After National Mining Ass'n v. United States Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998) overturned the Tulloch rule and permitted ditching activities in wetlands as long as the ditching created only incidental fallback, ditching was permitted. Three of the property owners retained an environmental expert to assist them in performing the ditching work in accordance with all applicable rules and regulations. Appropriate local permits were obtained. The environmental expert and some of the property owners met with the United States Army Corps of Engineers (the "Corps") prior to

---

[1] Counsel for the amicus curiae authored this brief in whole, and no counsel for the parties authored the brief. No person or entity other than the amici curiae have made a monetary contribution to the preparation or submission of the brief.

work being performed. The Corps was fully advised in writing of the scope of work that was to be performed and the techniques that were to be used. The Corps confirmed in writing for the Southern Pines site and Smith Farm sent to the Corps a confirmation letter following a meeting that the work to be performed did not require a § 404 permit. The Corps even inspected one of the properties as work was being performed. At no time during this process did the Corps advise that permits were required pursuant to the Clean Water Act ("CWA") or that the ditching work violated any law, rule, or regulation.

The sites were timbered in areas and specialized equipment was used to dig the ditches so as to minimize environmental impact. Linear ditches were dug not to channel surface water but to drain the ground water. Extreme caution was exercised so that any spillage was incidental fallback not requiring a permit.

Unbeknownst to the landowners, and despite the fact that the Corps had advised Southern Pines and Smith Farm that they did not need a § 404 permit, the local Corps officials sought guidance from headquarters as the work was being performed regarding interpretation of the hopelessly unclear regulations. After the completion of the work, the Environmental Protection Agency ("EPA") swooped in, wrested jurisdiction over the properties from the Corps, and contended that the work had violated Sections 402 and 404 of the CWA. Specifically, the EPA contended that the property owners and operators had violated the law by filling wetlands through the movement of soil and through spreading wood chips that were generated during the timbering and by failing to obtain storm

water pollution prevention permits. The EPA then filed enforcement actions against each of the amici curiae property owners. See In the Matter of Vico Construction Company/Smith Farm Enterprises, LLC/EPA Hearing, Docket No.: CWA-3-2001-0022, In the Matter of Vico Construction Company and Southern Pines Associates, L.C., Docket No.: CWA-03-2003-0325, In the Matter of Vico Construction Company and Amelia Venture Properties, LLC, Docket No. CWA-3-2001-0021, and In the Matter of J. Denbigh Associates, Inc. and Howard B. Hankins, Inc., Docket No.: CWA-3-2003-0375. Two of the cases (Smith Farm and Amelia Ventures) have already been tried and are awaiting the decision of the administrative law judge.

Strikingly, these enforcement actions are not about preventing pollution, the goal of the CWA. In the two enforcement actions already tried, the EPA took no water quality samples and did not contend that any pollutant actually reached navigable waters. In fact, the landowners' water quality expert who did test the water leaving the properties characterized the water turbidity as clearer than some tap water he had tested. The enforcement actions are more about establishing the EPA's right to assert jurisdiction than about protecting the environment.

The property owners steadfastly deny that they filled any wetlands and also, as is more pertinent to this case, deny that the wetlands on their properties are jurisdictional wetlands, i.e. "water of the United States;" subject to the CWA. The EPA makes its claim of jurisdiction over the properties based upon the asserted eventual hydrologic connection between the Tulloch ditches and navigable water.

Each of the amici curiae are currently opposing the EPA's sweeping assertion of jurisdiction over the wetlands on their properties because the wetlands are isolated and do not have a sufficient nexus to navigable water. The Tulloch ditches feed into other pre-existing ditches that exit the properties. This water then travels through culverts or other man-made crossings under highways and railroads before reaching any navigable water. In every case, the drainage ways forming the asserted hydrologic connection are intermittent, running dry without any flow during parts of the year.

Accordingly, the amici curiae's properties are like the Petitioners' in that they contain only isolated wetlands. Certiorari should be granted so that the EPA's assertion of jurisdiction over these properties can be rejected.

SUMMARY OF ARGUMENT

This case appeals the Corps' assertion of jurisdiction over isolated wetlands. Like the Petitioners, amici curiae are landowners embroiled in litigation with the EPA to oppose the EPA's expansive interpretations of its own jurisdiction.

The Corps and EPA claim jurisdiction over wetlands when the wetlands are hydrologically connected to navigable water without establishing any "significant nexus" between the properties' water and navigable water and interstate commerce. Because such a sweeping claim of jurisdiction violates this Court's guidance, it should be rejected.

This case presents an early opportunity for the Court to resolve conflicting circuit court interpretations of CWA jurisdiction and to provide much needed

certainty to landowners and government regulators, both of whom are floundering in the absence of any clear articulation of the scope of CWA jurisdiction.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE EPA'S ASSERTION OF JURISDICTION OVER ISOLATED WETLANDS VIOLATES THE CLEAN WATER ACT AND SUPREME COURT PRECEDENT.

The EPA's assertions of jurisdiction over the Petitioners' and amici curiae's properties conflict with the CWA and with this Court's decisions in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC") and United States v. Riverside Bayview Homes, 474 U.S. 121 (1985). The Fourth Circuit's most recent pronouncements in United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), and Treacy v. Newdunn Associates, LLP, 344 F.3d 407 (4th Cir. 2003), similarly conflict.

SWANCC held that the text of the CWA did not permit jurisdiction to be asserted over ponds that were "*not* adjacent to open water." 531 U.S. at 168 (emphasis in original). The dissent therefore characterized SWANCC as "excising" from CWA jurisdiction intermittent streams and wetlands that are not contiguous or adjacent to navigable waters. Id. at 189-90 n.14 (Stevens, J., dissenting). Instead, a "significant nexus" with navigable water is required.

Because the wetlands on both the Petitioners' and amici curiae's properties are not adjacent to navigable waters or primary tributaries, because all waterbodies leaving the properties are intermittent,

and because the EPA cannot establish a significant nexus between the properties and navigable water and commerce, jurisdiction over the wetlands is inappropriate under this Court's precedents.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL.

This month, the Court of Appeals for the Fifth Circuit issued its opinion in In re: Needham, No. 02-30217, 2003 U.S. App. LEXIS 25318 (5th Cir. Dec. 16, 2003), building on its earlier decision Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001).

The Needham ruling expressly distinguishes itself from prior Court of Appeals for the Fourth Circuit precedent, id. at 7, and holds that the "United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under SWANCC, 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'" Id. at 8.

The Fifth Circuit's Needham holding is squarely in conflict with the Fourth Circuit's holdings both in this case and in the recently decided United States v. Deaton, 332 F.3d 698 (4th Cir. 2003). Both Fourth Circuit cases accept the "hydrologic connection" theory in permitting the Corps and EPA to assert jurisdiction over any wetlands adjacent to any waterbody from which a path can be traced eventually to navigable waters irrespective of the rate or frequency of flow or the distance to navigable waters. In Deaton, the Fourth Circuit deferred to the Corps' claim of jurisdiction over "any branch of a tributary system that **eventually flows** into a navigable body of water." Id. at 711

(emphasis added). The hydrologic connection theory was explicitly rejected in Needham. Needham, slip opn. at 11 ("the term adjacent cannot include every possible source of water that eventually flows into a navigable-in-fact waterway"). Basing jurisdiction on hydrologic connections creates boundless jurisdiction because it could be claimed that any waterbody on the eastern half of the United States **eventually** flows into the Atlantic Ocean. The hydrologic connection theory requires no showing of a significant nexus between the waterbody and navigable water or commerce as has been required by this Court in SWANCC.

Because of this circuit split, a landowner in the Fourth Circuit will be subject to CWA jurisdiction when an identically situated landowner in the Fifth Circuit will not. This discrepancy is of particular concern to the Tidewater, Virginia region given the prevalence of wetlands in the area and to the amici curiae given the personal cost to them of the EPA's assertions of jurisdiction over their properties.

III. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE BEWILDERING ARRAY OF GOVERNING CLEAN WATER ACT LAW AND REGULATIONS.

Each of the amici curiae are landowners whose property rights have been diminished by the Corps' and EPA's sweeping assertions of jurisdiction over their properties. Each landowner was surprised completely by the EPA's eventual contention that the work done on their property required CWA permits because the law and regulations on jurisdiction are so unclear.

The interplay between the CWA, the Corps' regulations, and this Court's opinions is so confusing that even the Corps and EPA are befuddled when applying them to particular situations. In the cases involving the amici curiae despite having pre-authorized the procedures used and viewed the work in progress, the Corps never advised that a permit was required or requested that the work stop. Instead, the Corps sat on its hands and sought guidance about the work because its own regulations are unclear. In addition, and perhaps more damning, the Corps never advised the amici curiae that it was seeking guidance from its headquarters after the Corps had told the amici curiae that § 404 permits were not necessary for the work the amici curiae intended to perform. If the Corps simply had advised that the work was problematic or that it required permits, or that the Corps had questions and was seeking further guidance, the landowners would have complied gladly with all rules and regulations. That is why they retained an environmental expert and actively solicited Corps' involvement. Instead, the Corps said nothing and the work progressed to completion. Enforcement actions were then filed by the EPA after the work was completed.

Apparently recognizing that its regulations were incomprehensible, the Corps planned to develop new regulations. A political retreat was sounded, however, with a recent December 17th announcement that no new rule-making would be pursued, leaving the judiciary as the only hope for clarity.

The uncertainty generated by the current incomprehensible regulations encourages lengthy litigation. Although the work at issue in these cases

was completed years ago, the enforcement actions still drag on, with two of the four actions in their infancy. Litigation over jurisdictional debates is expert-intensive and costly. Because of the prevalence of wetlands throughout the Tidewater Virginia region, many landowners' property interests will be curtailed if CWA jurisdiction continues to be broadly interpreted. Nonetheless, only a few of these landowners will have the wherewithal to challenge the government's assertions of jurisdiction.

Perhaps knowing this limitation, the EPA and Corps continue to claim expansive jurisdiction, even when their interpretations conflict with the CWA or their own regulations.

For example, the CWA prohibits the discharge of a pollutant to "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1362(7) and (12). Corps regulations define "waters of the United States" as including "tributaries" and "wetlands" that are adjacent to tributaries. 33 C.F.R. §§ 328.3(a)(5) and (7). Therefore, the more waterbodies can be characterized as "tributaries," the more CWA jurisdiction expands. Although "tributary" was formerly defined in regulations, it is not a defined term presently. Accordingly, the Corps and EPA make up the definition as they go along.

In the enforcement actions against the amici curiae, the EPA characterizes just about any waterbody as a "tributary." Because these trickles of water do not bear any name on standardized maps, the enforcement action trials are replete with references to "unnamed tributaries." Despite the CWA's defining ditches as an example of a "point source," 33 U.S.C. § 1362(14),

roadside ditches become "tributaries" under the EPA's interpretations. Places where a wetland begins to form into a stream were called tributaries in the enforcement actions. The Corps representative testified about one such "tributary": "this is the start of the tributary. It isn't actually waters or a stream or anything of that at this point. It is a wetland area . . .. The actual exhibit shows an area of blackened leaves in that center portion of the photo. This is where the tributary actually starts."). Transcript of Amelia Venture Properties, LLC enforcement action at 345. Apparently, the EPA contends that wet areas are "tributaries" even when the waterbody lacks any discernible flow. Such an interpretation conflicts both with the CWA and with common sense.

Likewise, because the regulations provide that jurisdiction extends to the "ordinary high water mark," 33 C.F.R. § 328.4, the EPA has contended in the enforcement actions that marks evidencing the mere passage of water constitute "ordinary high water marks." This interpretation again ignores the plain text of the regulatory definition, which requires a line on a "shore," a term undefined in the regulations. Because the term is not defined, the Corps and EPA view the term "shore" as synonymous with "bank" even though the two terms are used distinctly in the same regulation. See 33 C.F.R. § 329.11.

In the enforcement actions already tried, counsel for the EPA repeatedly asked experts whether they were using terms such as "navigable" in a "descriptive sense" or in a "regulatory sense" because, according to the EPA, terms frequently have a different meaning under the regulations than the commonly understood definition. That straightforward terms used in

regulations have developed meanings completely divorced from their dictionary definitions is a sure sign that regulatory rulemaking has run amuck.

The EPA and Corps string these suspect definitions together to assert jurisdiction over isolated wetlands. Even though the assertion of jurisdiction over such lands is not permitted under the text of the CWA, the EPA relies on a series of interlocking regulations and its wishful spin on these regulations to claim jurisdiction. Tellingly, when asked during the trial of one of the enforcement actions how a property owner would be able to determine without expert assistance whether the property would be subject to CWA jurisdiction, the Corps' representative truthfully admitted that such a task would be impossible.

While amici curiae certainly urge the Court to reign in the Corps' and EPA's current expansive claims of jurisdiction pursuant to the CWA, amici curiae respectfully request that the Court grant certiorari simply to generate a clear rule outlining the bounds of jurisdiction so that other landowners will not endure the expense and hardship caused by the present system of ad hoc jurisdictional determinations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

HUNTER W. SIMS, JR.
Kaufman & Canoles, PC
150 W. Main Street, 21st Floor
Norfolk, VA 23510
(757)624-3000